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No. 84-1399

In the Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS FRED WARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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An examination of the Government's Memorandum in Opposition to Petitioner's Petition for Writ of Certiorari herein simply highlights the mistreatment which has been accorded Petitioner in the courts below.

THE DUPLICITOUS COUNT

In seeking to have this Court deny the requested Writ and thereby affirm the construction of 26 U.S.C. 7206(4) which was first applied by the trial court and later affirmed by the Tenth Circuit, the Government has stated that this section "proscribes concealment of *assets*" (U.S. Mem. 3). The statute, however, is not phrased in the plural

as "assets" but is phrased in the singular ("any property"). Obviously, the statute makes an offense complete upon each concealment of property with the requisite intent. It does not, by its wording proscribe a course of conduct.

In seeking to justify the use of the "porcupine count" against Petitioner herein, the Government has stated to this Court that the Tenth Circuit's holding is "consistent" with that adopted by other Courts of Appeals relative to "analogous criminal statutes". An examination of this contention and the cases cited in support thereof, clearly demonstrates that the opposition of the United States to Petitioner's request for Writ is specious at best.

The Government has cited to this Court, *United States* v. *Berardi* (7th Cir. 1982), 675 F.2d 894. A reading of the *Berardi* Opinion, however, shows not only was the statute (Title 18 §1503 — Obstruction of Justice) *not analogous* to §7206(4), but the Opinion itself lends support to the position of the Petitioner herein. In *Berardi* the obstruction statute contained words proscribing activity wherein an accused would "endeavor" to "influence" or intimidate a Grand Jury witness. In that case the Defendant was charged with a continuing course of conduct wherein three attempts were made to influence the testimony of one single witness during a "discrete period of time" (3 months). The court pointed out that the use of the word "endeavor" in the obstruction statute contemplated a continuing course of conduct with one object — that of influencing the testimony of one witness — and that it occurred (i) during a short period of time; (ii) it was committed by a single Defendant; (iii) it involved a single witness; and (iv) it involved a single purpose, that of influencing the witness

not to reveal facts to a Grand Jury. The *Berardi* court distinguished *United States* v. *Tanner* (7th Cir. 1971), 471 F.2d 128, on the basis that in *Tanner* there were numerous dates involved in the charge of transporting explosives and that the transportation occurred to five different cities and involved "wide ranging activities". The court pointed out there was nothing approaching the "endeavor to influence" language found in the obstruction statute in *Berardi*.

The *Berardi* Opinion went on to point out, that the dangers involved in a duplicitous One-Count charge was that an accused (a) would not have adequate notification of the charges, (b) that he may be subject to double jeopardy, (c) that he may be prejudiced by evidentiary rulings and (d) most importantly that an accused may be convicted by less than a unanimous jury. The court went on in *Berardi*, however, in contrast to the case at bar, to point out that at the trial level there was a specific instruction requiring unanimity of the jury on at least one attempt to influence the witness. The court further, in *Berardi*, in discussing the transaction language of 8(a), pointed out that this may comprehend a series of occurrences not depending so much on the immediateness of their connection as upon their logical relationship and that this should be guided by the extent of "evidentiary overlap" — in other words, in determining the duplicity objection the court should be guided as to whether two or more "offenses" require substantially the same proof.

In the case at bar, of course, the activities alleged in the "porcupine count" were far more wide ranging than in *Tanner* and involved different and disparate persons in re-

lation to each and different evidence.[1] Further, it is without question that the Petitioner was prejudiced by evidentiary rulings of the trial court by virtue of the fact that seven disparate charges were lumped into this one count. Also, the resulting unavailability of the defense of statute of limitations to six of the seven lumped together transactions prejudiced the Petitioner in his defense and denied him a fair trial and this is especially apparent in that the only "item" not barred by the applicable statute of limitations was the purchase of an $800.00 equity in a house which Government witness McDaniel (the alleged co-conspirator) testified she purchased *without* consulting the Defendant and from her own bank account funds. Additionally, in contrast to *Berardi* where the court approved the three attempts as the "endeavor" in one Count, the "porcupine Count" charges in the court below against this Petitioner covered a period in excess of five years, involved separate and disparate properties or interests therein, and involved different persons while in *Berardi* the court referred to the three attempts to influence a single witness as occuring in a "discrete period of time" — three months.

The Government has also cited to this Court, as a case involving similar treatment of an "analogous statute", the

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[1] The Government has improperly stated in the record that the corporate stock was purchased in the name of another. The evidence is contrary to this and in fact showed that the corporate stock was purchased and sold openly in Petitioner's name and the sale document was recorded. Moreover, there was no contradiction to evidence that Petitioner's partial equitable ownership in three properties legally owned by Government witness McDaniel was the subject of prior State court proceedings in Lawton, Oklahoma. Pertinent portions of the Indictment are in the Appendix to this Response.

case of *Cohen* v. *United States* (9th Cir. 1967), 378 F.2d 751, *cert. den.* 389 U.S. 897. Again, it is clear in *Cohen* that this involved a statute which is not "analogous" to 7206(4) in that the *Cohen* case involved a charge under 18 U.S.C. §1084 which proscribed the knowing utilization of interstate telephone facilities by one "engaged in the business of betting or wagering . . .". In *Cohen* a series of calls with one bettor were alleged as a single count violation. The statute is clear that there must be proof that one is "engaged in the business" of gambling and this necessarily contemplates proof of a series of acts. Again, we had the discrete period of time in the limited series of calls involving a single bettor. Obviously, this is not the construction of an analogous statute to that involved in the case at bar nor is the Ninth Circuit's treatment thereof consistent with the Tenth Circuit Opinion here objected to.

The Government has also cited the case of *United States* v. *Mangieri* (D.C. Cir. 1982), 694 F.2d 1270, as a case involving consistent treatment of an "analogous" statute. Again, this simply is not so. *Mangieri* involved a prosecution under Title 18 U.S.C. §1014 which proscribes false statements in a loan application made to various Federally insured institutions or agencies. In *Mangieri* a separate count was charged on each allegedly false application and in each application numerous false statements were contained. The defendant in *Mangieri* contended that each false statement in each application should be made the subject of a separate count; but the court properly held that the statute was directed at proscribing false applications and that multiple false statements *in a given application* were the means which resulted in the false loan applica-

tion. This is completely inapposite to the case at bar. In *Mangieri* the court held that each loan and the applications supporting the loan was a separate transactional episode. This clearly is not analogous in any way to the case at bar.

Finally again, the Government has cited to this Court, as a case involving consistent treatment of an "analogous" statute, the case of *United States* v. *Edmondson* (5th Cir. 1969), 410 F.2d 670. However, again this is inapposite and does not stand for the proposition posited by the Government herein. *Edmondson* was a prosecution involving perjury and false sworn testimony which occurred at the First Meeting of Creditors in a Chapter 11 Bankruptcy proceeding. The court held that the totality of the allegedly false testimony, all of which concerned letters surrounding a falsely represented order of 70,000 textbooks, could be included in one count. The defendant gave the false testimony at one single hearing — i.e., the First Meeting of Creditors — and the court concluded that this could be considered as part of the *res gestae* (means). Clearly, *Edmondson* cannot stand for authority supportive of the treatment accorded the Petitioner in the courts below.

The position of the Government and the treatment of the Petitioner in the lower courts would render the requirements of Rule 8(a) of the Federal Rules of Civil Procedure meaningless and would effectively nullify the prohibition against charging more than one offense in a single count. This should not be permitted.

Simply stated, the proscribed activity in 26 U.S.C. §7206(4) is the concealment of "any property" not *concealments* of *properties* over a five-year period as the Gov-

ernment contends. It requires a strained construction of the statute in order to approve what has happened below and such a construction, it is submitted, would make this statute unconstitutionally vague in its application.

THE ALLEGED CONSPIRACY

The Government in its Response to the position of the Petitioner on the alleged conspiracy, in light of the testimony of the co-conspirator McDaniel as a Government witness, is simply that it is without merit. This affirmative testimony has been quoted with specificity in the Petition herein. This was allowed to stand unimpeached and unchallenged by the prosecution. Therefore, as in *Vasquez*, the Government is bound by this testimony. In *United States* v. *Vasquez* (3rd Cir. 1963), 319 F.2d 381, the alleged co-conspirator testified that there was not agreement in relation to the bogus marriage and this was allowed to stand unimpeached and uncontradicted even though the witness without counsel, had previously herself pleaded guilty. In the case at bar, the alleged co-conspirator testified as a Government witness that there was *no agreement to conceal property* from the I.R.S. The Government, again as in *Vasquez*, made no effort to impeach this testimony and therefore should be held bound thereby. The Government, again as in *Vasquez*, failed to prove the agreement as explicitly averred in the Indictment.

Therefore, the foundational, basic requirement for a conspiracy conviction (the agreement) was missing. The ruling places the Tenth Circuit at direct odds with all other Circuits and with the precedents of this Court in that it

permits a conviction to stand absent any showing of an agreement between the Defendant and the alleged co-conspirator. It is clear from the testimony that the alleged co-conspirator had no intention *and made no agreement* to hide any property interest from the I.R.S.

CONCLUSION

It is respectfully urged that:

(1) The seven-item Count One in the Indictment was fatally duplicitous; and,

(2) The unimpeached testimony of the alleged co-conspirator as a prosecution witness that no agreement existed to violate the law as charged requires the dismissal of the Conspiracy Count.

The requested Writ of Certiorari should issue to the Tenth Circuit Court of Appeals to correct this injustice. The grandeur of our system requires no less.

Respectfully submitted,

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June, 1985

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	) No. CR-83-64-T
vs.	) Violations:
	) 26 USC §7206(4);
THOMAS FRED WARD,	) 18 USC §371
Defendant.	)

INDICTMENT

From on or about February 3, 1975, and continuously thereafter up to and including on or about April 27, 1980, in the Western District of Oklahoma,

THOMAS FRED WARD,

a resident of Lawton, Oklahoma, with intent to evade and defeat the collection of a substantial amount of the wagering excise taxes assessed against him on or about May 24, 1974, by the Internal Revenue Service, did knowingly and unlawfully conceal money and the following-described property and interests:

No.	(ON OR ABOUT)	INTEREST CONCEALED
1	February 3, 1975	That part of Section 21, T2N, R14W, I.M., Comanche County, Oklahoma, lying North of the new U.S. Highway 62 right-of-way consisting of 105 acres, more or less
2	February 7, 1975	That part of the NW-1/4 and the NE-1/4 and the SE-1/4, all in Section 21, T2N, R14W, I.M., Comanche County, Oklahoma, lying south of the new U.S. Highway 62, less and except minerals heretofore reserved by previous grantors

3	April 7, 1977	Lots 5, 6, 7, 8 and 9 of Block 68 to the city of Elgin, Comanche County, Oklahoma
4	May 19, 1978	2409 H Avenue: Lots 39 and 40, Block 7, Sunset Place Addition to the City of Lawton, Comanche County, Oklahoma
5	September 26, 1979	2104 Bessie: Lot 19, Block 2, Reynolds Addition to the City of Lawton, Comanche County, Oklahoma
6	April 17, 1980	1806 Smith: Lot 3, Replat of Block 33, Military Addition to the City of Lawton, Comanche County, Oklahoma
7	December, 1979	Soundstage Disco, Lawton, Oklahoma

Upon which levy was authorized by Title 26, United States Code, Section 6331.

All in violation of Title 26, United States Code, Section 7206(4).

* * *